IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT COMPANY, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 35 of the Supreme Court of the United States, the Electronic Industries Association files this motion for leave to file brief as Amicus Curiae in behalf of Crown Coat Front Company, Inc., Petitioner, in the instant case.

ELECTRONIC INDUSTRIES ASSOCIATION

By GRAHAM W. MCGOWAN
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INTEREST OF AMICUS CURIAE

The Electronic Industries Association (hereinafter referred to as EIA) is a major trade association, headquartered at 2001 Eye Street, N.W., in the District of Columbia. It represents nearly 300 domestic electronic manufacturers. It is the national association representing the fifth largest manufacturing industry in the United States with gross annual sales in excess of $15 billion. The manufacture of electronics includes the manufacture, installation and operation of nation-wide, world-wide electronic systems. The development and installation of these systems frequently consumes a period of many years. Technical improvements made in the electronic equipment during the installation of such systems often require substantial changes in the early concept to avoid obsolescence of the entire system. Due to the complexity of the problems involved in the manufacture, installation and operation of such electronic systems many Government contracts are awarded on a cost plus fixed fee basis with the cost to be determined at some period of time considerably subsequent to the completion of the work, in situations as set forth below.

After the fact negotiation of each year's allowable overhead with the government is conducted on an overall basis rather than separately under each contract by contractors with a large number of defense contracts. Where the contracts are with more than one military department, the Government's negotiating team will ordinarily include representatives of each of the Services. Subcontractor's costs billings and adjustments of previous billings may be received long after the work has been completed.

When such a billing is received, it is often proper, under generally accepted accounting practices, to charge the period in which the bill is received rather than disturb prior years' results. Thus, there will often be further charges under the contract to periods after the work has been completed.

The Government has the right to audit the contractor's costs at any time or times prior to final payment, pursuant to the "Allowable Cost, Fixed Fee and Payment" clause (ASPR 7-203.4), or some similar clause which appears in all cost-type contracts. The customary practice, however, is to delay the final comprehensive audit of direct costs until such time as the contract is ready to be "closed-out" and the contractor has submitted a final "completion voucher" covering all costs due and owing and such part of the fee as the Government has withheld. This, of course, occurs only when all overhead rates have been fixed and all subcontractor billing has been finalized. So it is not unusual to find disallowances of direct costs as well as overhead first being made years after the work has been completed and the costs actually incurred.

In cases where a dispute materializes, strict application of the *Crown Coat Front Company, Inc.** doctrine would mean that the cause of action had "accrued" long before the occurrence of the event that actually gives rise to the litigation—namely, the Government's refusal to reimburse an allegedly allowable cost.

QUESTIONS

1—Whether a right of action under a contract accrues prior to the time petitioner exhausts administrative remedies which are a mandatory provision of the contract?

2—If such right of action does accrue prior to the time Petitioner exhausts his administrative remedies, does the pendency of administrative action toll the Statute of Limitations?

3—If the pendency of administrative action does not toll the Statute of Limitations, then is such a contract provision valid if it in effect negates the Petitioner's right to sue?

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* 363 F. 2d 407 (1966).

RELEVANCY TO DISPOSITION OF THIS CASE

We recognize the urgency of a ruling which brings about a reasonable and early finality to a determination of party interests. It follows that such a ruling must preserve for the parties litigant a climate of fairness. Just claims must be met as must parties be relieved of undue exposure to claims of those who would cloud the true issues with lapse of time, vagueness, failing memories or missing witnesses. It appears that there is no finding in this case that the claim presented by Petitioner is unfair or that the Petitioner has not been diligent, and it must be noted that the Government chose to defend on the ground that the Statute of Limitations had run.

Whereas it may be conceded that there exists no jurisdiction for this type of litigation except for the jurisdiction conferred upon the court by 28 USC 2401(a). The likelihood of the courts extending this grant of jurisdiction is only exceeded by the impossibility of the courts diminishing the grant. However, the court, in this case in seeking a way to avoid extending the statutory period has in effect opened the door to eliminating it. As an example, a fixed cost contract for an uncomplicated item may be completed within one year and the contractor then has six years to litigate any dispute arising thereafter, provided he has exhausted his administrative remedies; if he has not done this, then according to the *United States* v. *Holpuch Co. Case*,* he must exhaust his administrative remedies and according to the *Crown Coat Front Co. Inc.* v. *United States Case*,** he then has the time remaining in the six year period to litigate. It may therefore be reasoned that should the administrative review consume six years; the contractor has lost his right to litigate. By such a ruling the court has deprived the contractor of a statutory right by insisting that he follow a contractual right to first exhaust the administrative remedies, all without evidence of laches or lack of diligence on the part of either party

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* 328 U.S. 730 (1946).

** 363 F. 2d 407 (1966).

and without concern for the latent invalidity of such a contract provision.

The fairness of such a ruling appears not to have been considered. The dissenting views of Justices Anderson, Kauffmann, Hayes and Feinburg correctly refer to a doctrine of fairness in applying the Statute of Limitations. We believe that the contract created for the Petitioner not only a right, but an obligation to apply for administrative relief prior to any judicial relief. Having successfully bargained for a contract providing not only the right but the obligation to seek administrative relief for contract claims in the event of a contract dispute, the Petitioner has not received the final benefit of the contract until he has diligently availed himself of all the contract rights, including the right to administrative relief. When administrative review has been completed and the right of the parties have been determined administratively, then for the first time the Petitioner has completed his contract and has a right to resort to the courts. It is respectfully submitted that at this point of time if the Petitioner has been diligent that the Petitioner's cause of action accrues. The Statute of Limitation has not been tolled nor has the period of time been extended, it simply has not become applicable, the court thus retains the jurisdiction to determine the issue of timeliness and avoids giving illegal effect to a contract provision intended only to reduce the occasions for litigation not to preempt it.

CONCLUSION

It is the belief of the Amicus Curiae, Electronic Industries Association, Inc., that the facts presented in this motion clearly indicate the great interest of the electronics industry in the questions presented by this case. This interest it is believed is sufficiently different and important than that of the Petitioner to entitle them to file a brief amicus curiae.

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